

No. 64

United States Court for the
Southern District of Florida

UNITED STATES OF AMERICA

DAVID THOMAS HEALY, et al

vs.
The United States, The United States District Court for the
Southern District of Florida

WRIT OF HABEAS CORPUS

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Attorneys for Appellee

IN THE
Supreme Court of the United States

No. _____

October Term, 1962

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, et al

On Appeal from the United States District Court for the
Southern District of Florida

MOTION TO DISMISS APPEAL

Appellee moves this Honorable Court to dismiss the appeal herein on the ground that the Appellant's Notice of Appeal was not filed within the time allowed by law.

JURISDICTIONAL ARGUMENT

The Judgment or Order appealed from herein is the Order granting the Motion dismissing both counts of the indictment, which was entered by the District Court on September 17, 1962. The Appellant admits that this appeal is from this Order on page 1 and 2 of its Jurisdictional Statement. The Notice of Appeal was not filed

until December 5, 1962; seventy-nine days after the entry of the Order appealed from.

Rule 11 (2) of the Supreme Court Rules provides that:

"An appeal permitted by law from a District Court to this Court in a criminal case shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the District Court within thirty days after the entry of the Order or Judgment appealed from".

It is well settled that neither the trial courts nor the appellate courts can extend the time for appeal. Fed. Rules Crim. Proc., 45 (b); *United States v. Robinson*, 361 U.S. 220, 80 S. Ct. 282 (1960).

Research fails to reveal a single case or statute authorizing the appellant to file a petition for rehearing of an Order dismissing an indictment, much less any law holding that such a Motion tolls the time for appeal. To allow the United States to stop the running of the time for appeal by filing a petition of this nature, would give the government the power to extend the time for appeal, in such cases, indefinitely.

If this appeal is not from the Order dismissing the indictment but from the Order entered November 5, 1962 denying the Petition for Rehearing, this Court lacks jurisdiction, as this appeal is outside the scope of title 18 section 3731 of the United States Code; see *United States v. Apex Distributing Co.*, 270 F. 2nd 747 (9th Cir. 1959). Statutes permitting criminal appeals on the part of the

United States have always been strictly construed because government appeals in such cases are uncommon, exceptional and unfavored. *Carroll v. United States*, 354 U.S. 394, 77 S. Ct. 1332 (1957); *United States v. Bordon Co.*, 308 U.S. 188, 60 S. Ct. 182 (1939).

CONCLUSION

It is respectfully submitted to this Honorable Court that this appeal is untimely, or in the alternative is not allowed by title 18, section 3731 of the United States Code and should be dismissed for lack of jurisdiction.

Respectfully submitted,

R. E. KUNKEL

ROBERT L. SHEVIN
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HARRY M. ROSEN

February 27, 1963.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellees' Motion to Dismiss has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served by mail upon ARCHIBALD COX, Solicitor General, Department of Justice, Washington 25, D. C., by air mail, and hand delivered upon EDWARD F. BOARDMAN, United States Attorney of the Southern District of Florida, Federal Building, Miami, Florida, this 20th day of February, 1963.

Q E Runkel